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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. [redacted] 871

FLORENCE VAN HOFF and VICTOR BERG,
Petitioners,

vs.

REDEVELOPMENT AGENCY OF THE CITY AND COUNTY OF SAN FRANCISCO, a public body, corporate and politic, and THE CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,
Respondents.

MOTION FOR LEAVE TO DISPENSE WITH PRINTING OF RECORD
and
PETITION FOR A WRIT OF CERTIORARI.

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vs.

REDEVELOPMENT AGENCY OF THE CITY AND COUNTY OF SAN FRANCISCO, a public body, corporate and politic, and THE CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,
Respondents.

MOTION FOR LEAVE TO DISPENSE WITH PRINTING OF RECORD UPON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA.

Come now petitioners, by their counsel, and respectfully move that the Court permit petitioners to proceed with their petition for writ of certiorari, seeking review of the judgment of the Court below, without requiring the printing of the record below.

Stipulation of counsel for all the parties is on file with the Clerk of this Court, agreeing that the record need not be printed.

Counsel for the parties each has selected that portion of the record which he believes may be helpful and those portions have been certified by the Clerk of the Court below and are on file with the Clerk of this Court. The record is voluminous and includes one volume of exhibits which contains maps, charts and photographs, the reproduction of which would be extremely expensive. This would involve an unproductive expenditure of much money by petitioners who are home owners in the area involved and are not people of wealth. Requiring them to have the record printed would impose an almost unbearable burden and hardship upon them, while a complete determination of the substantial issues herein involved can be had without a printed record without inconvenience to the Court and without prejudice to the rights of any of the parties.

Dated, San Francisco, California,
May 14, 1954.

Respectfully submitted,
MARTIN J. JARVIS,
Attorney for Petitioners.

JACK H. WERCHICK,
Of Counsel.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST DISTRICT, DIVISION ONE.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the District Court of

Appeal of the State of California, First District, Division One, entered on January 26, 1954.

OPINION BELOW.

The opinion of the District Court of Appeal is reported at 122 Adv. Cal. App. 836 and 123 Adv. Cal. App. 355, 266 P. 2d 105, and is attached to this petition as Appendix B.

JURISDICTION.

The judgment of the District Court of Appeal was entered on January 26, 1954. A petition for rehearing was timely filed and was denied on February 25, 1954. A petition for hearing was timely filed with the Supreme Court of California and was denied on March 25, 1954, three of the seven justices voting for a hearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) and is supported by Rule 38(5)(a), Revised Rules of the Supreme Court of the United States (1950) and by the applicable rule stated in *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, at pages 289 and 290. The Federal questions upon which petitioner seeks review were raised at every step of the proceedings below—in the original Court, in the petition for rehearing and in the petition for hearing before the State Supreme Court. Review by this Court is the only means remaining by which petitioners may remedy the denial of their substantial Federal rights.

Federal questions are involved, not only because petitioners were, and will be further, deprived of property without due process of law by reason of the decision below, but also because they were denied a trial in the Court below in violation of the Fourteenth Amendment.

QUESTIONS PRESENTED.

1. Is this a case such as was anticipated by the Court in *Hairston v. Danville & Western Ry.*, (208 U.S. 598, 607):

> "No case is recalled where this Court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws. * * * We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain. * * *"

2. Where a state Constitution permits property to be taken under the power of eminent domain for a public use, may state legislation broaden the power of eminent domain by enlarging the definition of "public use", beyond any previously sanctioned concept, to include condemnation of land characterized as "blighted", not because its condition presents a police power problem, but because it is not now being used to its fullest economic possibility and is not arranged to fit ideas of city development?

3. Where the Court permitted petitioners to intervene and file an answer, and where the constitutional application of a statute depends upon the existence of certain facts, may the Court, in deciding the constitutionality of the statute, ignore the answer and factual issues raised and, by assuming the truth of all the facts alleged in the complaint, decide the case adverse to interveners?

4. If the Statute in question is constitutional, was it applied in a manner consistent with the protection afforded by the Fourteenth Amendment?

5. Are petitioners deprived of property without due process of law when their property is taken by the power of eminent domain under a statute which vests in an agency and board of supervisors the right to determine under what conditions the power may be exercised without providing standards by which such determinations shall be made?

STATUTE INVOLVED.

The material provisions of the "Community Redevelopment Law" (Part I, Division 24, Sections 33000-33954 of the Health and Safety Code of the State of California)[1] are set forth in Appendix A.

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[1]Hereafter referred to as "the statute."

STATEMENT OF THE CASE.

This case does not involve slum clearance or low-cost housing, but involves a proposal to take vacant land by the power of eminent domain, to prepare it for building sites and then to sell it to private builders for expensive "view" homes and apartments.

Petitioners are residents and taxpayers of the City and County of San Francisco, who reside, own homes and vacant land in the Diamond Heights Project Area[2], and were found by the Court below to be sufficiently interested in and affected by this action to be permitted to intervene as parties.

Respondents are members of the Redevelopment Agency of the City and County of San Francisco[3], a public body, corporate and politic, and the City and County of San Francisco, a municipal corporation.[4]

Respondent agency undertook to redevelop two separate areas under the provisions of the statute. Since one, Western Addition was concerned with slums, it is not involved herein. The other area is the Diamond Heights area, in which petitioners are residents and property owners. Since this project was the first attempted under the statute, a "friendly" test suit was arranged by respondents by having the chairman of the agency refuse to sign certain loan and grant contracts with the United States of America, whereupon, the other members of the agency and the City and County filed a petition for a writ of mandate

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[2]Hereafter referred to as "Diamond Heights."
[3]Hereafter referred to as "the Agency."
[4]Hereafter referred to as the "City and County."

with the Supreme Court of California, ostensibly to compel the chairman to sign the contracts—but actually to test the constitutionality of the statute. The cause was transferred to the Court below, where petitioners (herein) were granted leave to intervene on the grounds that they had a sufficient interest in the subject of the litigation and would be directly and immediately affected by the judgment of the Court.

The petition for writ of mandate referred to certain preliminary steps taken and then set forth, largely in the words of the statute, the alleged conditions of "blight" claimed to exist in Diamond Heights, upon the existence of which the purported application of the statute was based. See summary of allegations of petition in Decision, Appendix B, pages 3 to 8 inclusive.

Petitioners (herein) *answered* the petition for writ of mandate—denying the material allegations of the petition and thereby raising important and basic issues of fact upon the determination of which the property rights of petitioners (herein) depended. The answer alleged further that 65 per cent of the 325 acres in Diamond Heights are now, and for many years past have been, owned by public agencies; that in that area, which is hilly like much of the rest of San Francisco, most of the streets which are of unusable grade are located in the publicly owned portion; that no proposal is made in the plan for redevelopment to route main thoroughfares for "through traffic" through the area, but only to install streets necessary to serve the area itself and to connect them with main thorough-

fares adjoining; that there is no land or housing shortage in San Francisco, except for the normal demand for *low*-cost housing present in almost all large cities—but that this kind of shortage would not be relieved by the proposed construction of *high*-cost "view" homes and apartments; that the portion of the area occupied by private persons is served by utilities; and that if the city released its publicly-owned land for private use, the present owners and private enterprise, without public assistance, could and would develop Diamond Heights within existing laws and regulations, and without loans and grants from the government. (R. pp. 311-315.)

The answer further alleged, in effect, that the findings, alleged to have been made by the board of supervisors, were arbitrary, capricious and without any substantial or competent evidence to support them; that the statute was unconstitutional and void because it proposed the taking of private property by the power of eminent domain for a private and not a public use; that if the Court found the statute constitutional on its face, nevertheless it was being applied in the instant case arbitrarily, capriciously and in an unconstitutional manner, such as would deprive interveners (petitioners herein) of property without due process of law in violation of State and Federal Constitutions. (R. pp. 316-317.)

The answer also contained a general demurrer to the petition for the writ of mandate on substantially the same constitutional grounds above stated. (R. p. 310.)

Respondents (petitioners below) demurred generally and specially to the complaint in intervention (answer) on the grounds that interveners have no right to intervene and that the answer does not state facts sufficient to constitute a defense to the petition for the writ of mandate, and moved to strike the complaint in intervention on the grounds that it was sham, irrelevant and argumentative. (R. pp. 335-338.)

At the hearing of the cause, the right to intervene was sustained, but interveners' (petitioners herein) request for a trial on the disputed facts, as well as all the demurrers and the motion to strike were taken under submission by the Court below. (R. p. 415.)

In its decision on the case (Appendix B) the Court below announced that the demurrers to the petition for writ of mandate and to the complaint in intervention (answer) were overruled; that the motion to strike the complaint in intervention was granted, to all except those portions which constituted a demurrer to the petition for the writ, because "(we) deem it better to confine the issues to those of law, leaving the factual issues, if any, to be determined in a tribunal better adapted to trying them." (Decision, page 9.) The Court below *assumed* to be true all the facts alleged by the petition for writ of mandate and decided the case adversely to interveners (petitioners herein), without hearing intervener's side of the case.

REASONS FOR GRANTING THE WRIT.

1. This is a case of first impression both with this Court and with the Court below.

2. It involves new and important questions of widespread importance and interest, since it concerns "urban redevelopment" law, about which statutes have been adopted recently by 34 states and four territories of the United States.

3. The question of "public use" involved in the instant case will not be determined by peculiar, local conditions, because many of the redevelopment laws are premised upon the same hypothesis—the application of the power of eminent domain, not to clear slums or provide low-cost housing or to eliminate other police power problems, but to adapt and use vacant areas which are not now being used to their fullest economic possibility and are not arranged to fit current ideas of city development. Hence, this case is distinguishable from the *Fallbrook, Clark, Strickley, Hairston, Rindge*[5] and other similar cases, where this Court declined to interfere with the state Court's determination of "public use" on the ground that state Courts and legislatures were better informed of peculiar, local conditions which might create a "public use" in one circumstance where, in a different locale, that circumstance would be a private use.

4. This Court has granted a hearing on its October, 1954 calendar in the case of *Morris v. Parker,*

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[5] *Fallbrook Irrigation Dist. v. Bradley,* 164 U.S. 112; *Clark v. Nash,* 198 U.S. 361; *Strickley v. Highland Boy Gold Min. Co.,* 200 U.S. 527; *Rindge Co. v. Los Angeles,* 262 U.S. 700; *Hairston v. Danville, etc. Ry.,* supra.

District of Columbia et al., 177 F. Supp. 705, which involves the "Redevelopment Act" for the District of Columbia, and concerns questions similar and related to those of the instant case. An opinion by this Court in the *Morris* case, without considering the instant case, could result in uncertainty and confusion among the various states as to their powers under their redevelopment laws and would certainly make uncertain the extent of the protection provided by the Fourteenth Amendment to property rights in "redevelopment" situations.

5. Petitioners herein have no other adequate remedy for the denial of their Federal rights by the judgment of the Court below, which according to California law, is res judicata of the matters purportedly decided there. If this writ of certiorari is denied here, the Court below will immediately issue its peremptory writ of mandate ordering the chairman of the agency to execute the contracts with the United States of America. Loans and grants of moneys will be made and tax moneys expended. Petitioners will be deprived of property rights because they will lose the right to build upon, remodel or add to their property as soon as the "go-ahead" signal is given—which awaits the determination of the instant case—because the statute provides that applicants in the area shall be "put on notice" of the contemplated redevelopment of the area, hence, this would affect the determination of "market value" of the property upon subsequent condemnation. (The Statute, Section 33574, Appendix A.)

6. By the decision and judgment of the Court below, petitioners have been denied "procedural" due process of law because important Federal rights were denied to petitioners on the basis of facts "assumed to be true" by the Court below without any evidence, in spite of denials of those alleged facts by petitioners. This was done in a matter where the conclusion of law as to the Federal rights and the findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal questions, to analyze the facts, which the Court below refused to do. In other words the Court below denied petitioners a full and fair hearing, refusing to hear their side of the case.

7. A long line of decisions by this Court and by State Courts consistently hold to the rule that while great deference is paid to legislatures (and State Courts), that the Courts must ultimately determine the questions: what is a public use; have administrative agencies lawfully invoked the political power of the legislature; was the legislation based upon an arbitrary belief of the existence of the evils it was intended to remedy; whether the means chosen are reasonably calculated to cure the evils reasonably believed by the legislature to exist and was petitioner denied a full and fair trial below. *People of Puerto Rico v. Eastern Sugar Associates,* 156 F. 2d 316, certiorari denied 329 U.S. 773; *Fallbrook Irrigation District v. Bradley,* supra; *U.S. v. 209.25 Acres of Land,* 108 F. Supp. 454; *Chicago, Burlington R.R. v. Chicago,* 166 U.S. 226; *Carlson v. Curtiss,* 234 U.S.

103; *Dahnke-Walker Co. v. Bondurant,* 257 U.S. 282; *Brinkerhoff-Faris Co. v. Hill,* 281 U.S. 673; *Borden's Co. v. Baldwin,* 293 U.S. 194.

ARGUMENT.

1. IS THIS A CASE SUCH AS WAS ANTICIPATED BY THE COURT IN HAIRSTON v. DANVILLE & WESTERN RY., 208 U.S. 598?

In the above cited case, at page 607, the Court stated:

> "No case is recalled where this Court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws. * * * We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain. * * *"

See "Reasons for Granting the Writ", supra, points 1, 2, 3 and 7.

Petitioners further respectfully contend that this Court should "decline to follow" the decision of the Court below because it is not the expression of the highest Court of the state (three of the seven justices there voted for a hearing after decision by the Court below) and because, it is respectfully submitted, the decision below is inconsistent in its reasoning, is based on facts *assumed* without any evidence in sup-

port thereof, and because the Court below failed to decide the case as a whole, contrary to the principle established in *U. S. ex rel. T.V.A. v. Welch,* 327 U.S. 546, 553, but considered only one side of the question and based its decision on that consideration.

The instant case presents a "general welfare" question, that is, the attempted justification of the proposed use of the land is not to remove any existing menace to the health, safety or morals of the people, but to benefit the general welfare.

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2. **WHERE A STATE CONSTITUTION PERMITS PROPERTY TO BE TAKEN UNDER THE POWER OF EMINENT DOMAIN FOR A PUBLIC USE, MAY STATE LEGISLATION BROADEN THE POWER OF EMINENT DOMAIN BY ENLARGING THE DEFINITION OF "PUBLIC USE", BEYOND ANY PREVIOUSLY SANCTIONED CONCEPT, TO INCLUDE CONDEMNATION OF LAND CHARACTERIZED AS "BLIGHTED", NOT BECAUSE ITS CONDITION PRESENTS A POLICE POWER PROBLEM, BUT BECAUSE IT IS NOT NOW BEING USED TO ITS FULLEST ECONOMIC POSSIBILITY AND IS NOT ARRANGED TO FIT CURRENT IDEAS OF CITY DEVELOPMENT?**

The California Community Redevelopment Law was passed in 1945 and has never been tested as to constitutionality. The California Constitution permits private property to be taken for public use by exercise of the power of eminent domain. (Article I, Section 14.) Neither slum clearance nor low-cost housing is involved in this case. This case deals with the proposed application of the power of eminent domain to a new subject, as stated by the Court below:

> "Its claimed necessity for redevelopment is its economic dislocation and disuse." (Decision, page 17.)
>
> "It might be pointed out that as our community life becomes more complex, our cities grow and become over-crowded, and the need to use for the benefit of the public areas which are not adapted to the pressing needs of the public becomes more imperative, a broader concept of what is a public use is necessitated." (Decision, page 37.)

Petitioners respectfully urge that this new purpose is not a public use or purpose and is, therefore, a taking of property in violation of specific constitutional guarantees.

California Courts have heretofore readily accepted the principle that the protection of the health, safety and morals of the people, or use by the public, constituted public uses or purposes for which the power of eminent domain might be exercised. However, no California decision, nor any by this Court, has heretofore expanded that power to include the taking of property beyond the scope of this principle. In the instant case, neither the allegations of the petition for the writ, nor the decision of the Court below, proposes or finds any "use" by the public, but it is stated that a public "purpose" is being served by making available to private builders (for expensive "view" homes and apartments) this land which is now in "economic dislocation and disuse". Every one of the California decisions, heretofore upholding the exercise of the power of eminent domain, has either found

in the proposed use a *right* of *public* use *or* elimination of direct threats to the health, safety and morals of the people, *or* the provision of low-cost housing. (See *University of Southern California v. Robbins,* 1 Cal. App. 2d 523, 527, 37 P. 2d 163, certiorari denied, 295 U.S. 738; *Housing Authority v. Dockweiler,* 14 Cal. 2d 437, 94 P. 2d 794.)

In support of its decision to broaden the "concept of what is a public use" the Court below cited and reviewed many cases. (Decision, pages 17 to 26.) From those cases the Court below concluded that "the right to its use (eminent domain) depends upon what is referred to in the *Schneider* case[6] as a 'compelling community economic need'." But analysis of the cases considered by the Court below reveals no such new and broadened power of eminent domain either approved or contemplated, except in the *Schneider* case, supra, where the three-judge Court for the District of Columbia, considering a situation very much like that in the instant case, rejected the proposed exercise of the power of eminent domain, stating, at page 720:

> "We are of the opinion that the Congress, in legislating for the District of Columbia, has no power to authorize the seizure by eminent domain of property for the sole purpose of redeveloping the area according to its, or its agents', judgment of what a well-developed, well-balanced neighborhood would be; lest this sentence be misconstrued out of context, we repeat our hypothetical assumption * * * that no slum exists on the

[6] *Schneider v. District of Columbia,* 117 F. Supp. 705.

> hypothetical property or in the area and that the seizure is not for a public use."

At page 724 of the same opinion, the Court further states:

> "We hold that Congress did not in the Redevelopment Act confer power to seize property beyond the reasonable necessities of slum clearance and prevention, the word 'slum' meaning conditions injurious to the public health, safety, morals and welfare."

The cases considered by the Court below, in arriving at its new expanded concept of "public use" were not concerned with a new application of the power of eminent domain, but dealt with slum clearance, except *Fallbrook, Clark* and *The City of Chicago* cases.[7] The latter was sustained by the Illinois Court, with a strong dissenting opinion, only after a rehearing of a decision which held exactly the opposite of the rehearing decision, and, as indicated by the Court below in the instant case, only because of its relation to slum clearance. (Decision, page 25.)

The *Fallbrook Irrigation District v. Bradley* case, supra, cited and quoted in part in the opinion of the Court below, has often been cited as promulgating the rule that a state's power of eminent domain may be exercised if the taking "be essential or material for the prosperity of the community. No such unlimited extension of power is provided by that case.

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[7] *People ex rel. Gutknecht v. City of Chicago*, 399 Ill. 551, 111 N.E. 2d 626.

In *Clark v. Nash,* supra, the Court stated, at page 369:

> "But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State."

In *People of Puerto Rico v. Eastern Sugar Associates,* supra, at page 323, the Court stated:

> "It does not follow from this, however, that a taking of property from one, for the purpose of transferring it to another, without anything more, conforms to due process of law. Some public benefit or advantage must accrue from the transfer and mere financial gain to the taker is not enough, since the Supreme Court has intimated that the power of eminent domain cannot be used by the taking authority in aid of 'an outside land speculation.' Brown v. U.S., 263 U.S. 78, 84."

The Court below, in its decision, sought to distinguish the *Schneider* case on its facts; but that it is not so distinguishable is evident from the language of the Court in that case, at page 719:

> "The hypothesis in * * * this consideration is an urban area which does not breed disease or crime, is not a slum. Its fault is that it fails to meet what are called modern standards. Let us suppose that it is backward, stagnant, not properly laid out, economically Eighteenth Century—anything except detrimental to health, safety or morals."

California law has not changed from the expression of the Court in *Eckel v. Springfield Tunnel, Etc. Co.*, 87 Cal. App. 617, 625, 262 P. 425:

> "* * * it is elementary that private property cannot be taken for private use upon the ground that it is more valuable to the taker than to him from whom it is taken."

Considering a statute almost identical with the California statute here in question, the Justices of the Supreme Court of Rhode Island, in upholding the statute as to slum clearance, ruled:

> "* * * by our present opinion we are not to be understood as holding that under this act a community through an agency may engage in a redevelopment project based mainly upon esthetic views or upon considerations of economic advantage to the municipality, or a combination of both. Unless it is found that under the act, as herein construed and limited, a community redevelopment program is necessary to protect the public health, morals and safety through the elimination of blighted areas the act does not apply."
>
> *Opinion to the Governor*, 69 A. 2d 531.

It should be noted that many of the state decisions which have upheld the exercise of eminent domain for slum clearance have based that right upon protection of health, safety and morals. In the instant case the basis of the use of the power is to promote the "general welfare".

> "There is no more subtle means of transforming the basic concept of our government, of shifting from the preeminence of individual rights to

the preeminence of government wishes, than is afforded by redefinition of 'general welfare', as that term is used to define the Government's power of seizure."

Schneider v. District of Columbia, 117 F. Supp. 705, 720.

The declarations of the legislature in a statute as to its needs and purposes, and the presumed findings of fact by the legislature in support of its legislation, are not conclusive upon the Courts, for, as stated in *People of Puerto Rico v. Sugar Associates,* 156 F. 2d 316, 324:

"* * * it is our duty to determine whether their enactment rested upon an arbitrary belief of the existence of the evils they were intended to remedy and whether the means chosen are reasonably calculated to cure the evils reasonably believed by the legislature to exist."

"* * * This court, referring to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' Davidson v. New Orleans, 96 U.S. 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law."

Petitioners respectfully submit that the Statute violates the inhibition of the Fourteenth Amendment

by providing for the exercise of the power of eminent domain for a private use and purpose.

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3. **WERE PETITIONERS DEPRIVED OF (PROCEDURAL) DUE PROCESS OF LAW BY THE ACTION AND DECISION OF THE COURT BELOW?**

In a petition for writ of mandate, where the Court permitted interveners to appear as parties opposing the petition and file an answer, where the cause is at issue with allegations and denials of fact and where the constitutional application of a state statute depends upon the existence of certain facts, may a state Court, in deciding the constitutionality of the statute, ignore the entire answer which places the facts in dispute, and, by assuming the truth of all the facts alleged in the petition, decide the case adversely to interveners?

> "That to condemn without a hearing is repugnant to the due process clause of the Fourteenth Amendment needs nothing but statement."
>
> White, C. J., in *Riverside etc. Mills v. Menefee*, 237 U.S. 189, 193.

The instant case was initiated as a "friendly" test case by having the Chairman of the Agency refuse to execute certain contracts, whereupon the other members of the Agency and the City and County sought a writ of mandate to compel said Chairman to execute the contracts. Petitioners (herein) were granted leave, by the Court below, to intervene on the ground they had alleged: that petitioners were

residents and property owners of Diamond Heights, taxpayers of said City and County, and had an important, direct and immediate interest in the litigation; that there were many other persons similarly situated who were too numerous to join in the proceedings; and that the intervention would be for the interests of interveners and the others too numerous to appear.

Interveners (petitioners herein) then filed a complaint in intervention (an answer) in accordance with California law:

> "At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court * * *."
>
> *State of California Code of Civil Procedure,* Section 387.

"* * * The order of the * * * court granting leave to intervene determined that interveners had an interest in the matter in litigation, and under Section 387, Code of Civil Procedure, were entitled as parties to avail themselves of all of the procedure and remedies to which the defend-

ants were entitled for the purpose of defeating the action or resisting plaintiff's claim. (People v. Perris Irr. Dist., 132 Cal. 290.)"

Townsend v. Driver, 5 Cal. App. 581, 583-4, 90 P. 1071.

Interveners, in their complaint in intervention (answer) denied those material allegations which the Court below, in its decision, assumed to be true, and interveners alleged certain ultimate, issuable facts by way of an affirmative defense to the issuance of the writ. In addition, and in the alternative, as permitted by California law, interveners demurred to the petition for the writ on the grounds that it stated no cause of action for the relief prayed, since the action sought to be done is prohibited by the Fourteenth Amendment and by certain specified sections of the California Constitution.

In their pleadings, interveners admitted that Diamond Heights is hilly and that some of the streets were laid out not according to contour, that there are about 500 parcels in separate ownership, that the area was subdivided by 1891 and that, of the 325 acres in the area, 115 are in private ownership, of which about 43 per cent is improved with houses. They alleged that 65 per cent of the entire area, or 210 acres, are now, and have been for many years past, in public ownership and vacant. Interveners denied all the other material allegations of the petition for the writ, thereby raising important issues of basic facts.

The Agency and the City and County (petitioners below) responded to the complaint in intervention, by demurrer, general and special, on the grounds that it did not state facts sufficient to constitute a defense to the petition and on the further ground that interveners were without right to intervene. They also moved to strike the complaint in intervention on the grounds that it was sham, irrelevant and argumentative.

At the hearing of the cause, the Court below denied the motion to "oust" interveners from the action. The other matters—demurrers, motion to strike and interveners' request for a trial on the disputed facts (in the event their general demurrer was overruled)—were submitted. In its decision, the Court below overruled the general and special demurrers to the complaint in intervention, but granted the motion to strike all portions of that pleading except the portion which constituted a demurrer to the petition for writ of mandate. Hence, the Court ruled against interveners on their demurrer and also deprived them of an opportunity to proceed with their proof as to the facts upon which they relied as a defense, stating:

> "Under the situation in this case and because of the limited facilities of this court to conduct a trial on factual issues, we deem it unnecessary to determine whether we have the power to permit interveners to raise issues of fact, but deem it better to confine the issues to those of law, leaving the factual issues, if any, to be determined in a tribunal better adapted to trying them. Therefore we will grant petitioners' mo-

tion to strike all of the complaint in intervention except those portions constituting a demurrer."

Decision, page 9.

"In view of contentions made in the petitions for rehearing, we deem it advisable to add the following to our opinion: 'As we have herein stated, our decision is limited to questions of law, based upon the assumption that the findings of the administrative agencies involved in the redevelopment program are true.'

The petitions of interveners and amicus curiae for rehearing are denied."

Opinion of the Court below on denial of petition for rehearing, 123 Adv. Cal. App. 355.

California law provides that the District Court of Appeal may take evidence. Article VI, Section 4¾, California Constitution; Section 956a, Code of Civil Procedure.

"When a court of equity once obtains jurisdiction of a case it will decide the whole case as between the parties and not leave any part of it for future litigation."

Cook v. Winklepleck, 16 Cal. App. 2d Supp. 759, 765, 50 P. 2d 463.

"In mandamus proceedings, petitioner must prove every fact that lies at the foundation of his proceeding and where an answer to the petition for the writ states several facts as defenses to the action, judgment should not be given until the issues have been disposed of."

Cothran v. Cook, 146 Cal. 468, 80 P. 699;

Gregg v. Pemverton, 53 Cal. 251.

"The granting of affirmative relief to the interveners is but incidental to the main purpose of the section of the Code of Civil Procedure, which is to obviate delay and multiplicity of actions by creating an opportunity to those directly interested in the subject matter to join in an action already instituted * * *."

Belt Casualty Co. v. Furman, 218 Cal. 359, 23 P. 2d 291.

"* * * the court cannot, by holding without reason that it has no jurisdiction of the proceeding, divest itself of jurisdiction and evade the duty of hearing and determining it (citing case)."

Robinson v. Superior Court, 35 Cal. 2d 379, 383, 218 P. 2d 10.

In its decision, the Court below stated that it had *assumed* the truth of the findings of the administrative agencies involved. But interveners had denied the allegations of findings and had alleged, in effect that the findings were arbitrary, capricious and fanciful. This allegation should have been tried and determined by the Court below.

"Where an administrative agency acts arbitrarily, capriciously or fraudulently, such action constitutes an abuse of discretion, and, since unauthorized, an excess of jurisdiction subject to correction by the courts."

McDonough v. Goodcell, 13 Cal. 2d 741, 91 P. 2d 1035;

U. S. v. 277.97 Acres of Land, 112 F. Supp. 159, 162.

"While, in ordinary cases, we are bound by the findings of the state court of last resort respecting matters of fact, it hardly is necessary to say that that court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a Federal right, any more than it could do so by making findings that were wholly without support in the evidence."

Carlson v. Curtiss, 234 U.S. 103, 106.

"Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support. * * * But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law."

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 681.

See, also:

Borden's Co. v. Baldwin, 293 U.S. 194.

"There can be no compromise on the footing of convenience or expediency or because of a natural desire to be rid of harassing delay, when that minimal requirement (a fair hearing) has been neglected or ignored."

Ohio Bell Tel. Co. v. Comm'n., 301 U.S. 292, 304.

The judgment of the Court below, unless set aside, is *res judicata,* as to interveners (petitioners herein) because it is the rule in California that, by a com-

plaint in intervention the intervener becomes a party to the action and the judgment in such a case becomes binding and conclusive on the intervener, who is estopped from further claims as to those matters adjudicated.

Mosier v. Suburban Estates, Inc., 137 Cal. App. 574, 31 P. 2d 209.

Since the Court below, in permitting petitioners (herein) to intervene in the action below, determined that they had a sufficient interest in the case which would be directly and immediately affected by the judgment of the Court, petitioners respectfully submit that, by being denied a full and fair hearing in the Court below, they were denied due process of law in contravention of the Fourteenth Amendment.

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4. IF THE STATUTE IN QUESTION IS CONSTITUTIONAL, WAS IT APPLIED IN A MANNER CONSISTENT WITH THE PROTECTION AFFORDED BY THE FOURTEENTH AMENDMENT?

Assuming *arguendo* that the statute is constitutional, under the circumstances of the instant case it is unconstitutionally applied to petitioners in violation of their Federal rights protected by the Fourteenth Amendment by depriving them of property without due process of law and by denying them equal protection of the law.

"A statute may be invalid as applied to one state of facts and yet valid as applied to another."

Dahnke-Walker Co. v. Bondurant, 257 U.S. 282, 288.

As applied in the instant case, the proposed taking is for a private use and not for a public use and the application of the statute to petitioners is arbitrary, oppressive and discriminatory and has no reasonable relation to the protection of the public health, safety, morals or welfare, or to any of the objects or purposes for which the statute was enacted.

In the statute, the legislature made no declaration concerning the specific property involved. There is not one word, even in the facts "assumed true" by the Court below, which even suggests that the Diamond Heights area presents a slum problem. The most that the Court below could find, even assuming the alleged facts to be true, was that the layout disregards the contours, that there are many owners, that the streets are steep and the lots irregular in size and shape, and, for these reasons, the land is undeveloped and should be made available for private (non-low cost) housing. The legislature intended no such far-fetched extension of the statute to permit the seizure of a wholesome, undeveloped area from its present owners to be developed into expensive "view" homes and apartments.

> "A grant of the power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice, will never pass by implication, and when the power is granted, the extent to which it may be exercised is limited to the express terms or

clear implication of the statute in which the grant is contained."

City of Los Angeles v. Koyer, 48 Cal. App. 720, 725, 192 P. 301.

Analysis of the statute can lead only to the conclusion reached by the highest Court of Rhode Island in *Opinion to the Governor,* 69 A. 2d 531 (1949), where the Rhode Island Redevelopment Statute, almost identical to California's, was construed. The Rhode Island Court concluded that their law authorized the agency to acquire property for the purpose of "eliminating blighted areas that are 'conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime.'", but not for "esthetic" or "economic advantage to the municipality" as proposed in the case at bar.

Reading the pertinent provisions of the statute it is clear that the declaration of the legislature did not concern all conditions everywhere in the State. It declared as a matter of legislative determination that the conditions to which it referred "constitute either social or economic liabilities, or both, requiring redevelopment in the interest of the health, safety, and general welfare * * *" (Section 33040.) That "(Such blighted areas) contribute substantially and increasingly to the problems of, and necessitate excessive and disproportionate expenditures for, crime prevention, correction, prosecution, and punishment, the treatment of juvenile delinquency, the preservation of the public health and safety, and the maintaining of ade-

quate police, fire and accident protection and other public services and facilities."

In these quoted phrases is the description of the conditions to which the statute is directed. For the elimination of these conditions, it states, the exercise of the power of eminent domain to acquire property is necessary. But, giving the restricted interpretation to a grant of the power of eminent domain as is required by Common Law and California law, the agency may exercise that power only under the conditions imposed by the legislature.

As stated in *Cincinnati v. Vester,* 281 U.S. 439 at 446:

> "* * * when a city acquires property for public use, it would seem clear that a mere statement by the council that the excess condemnation is in furtherance of such use would not be conclusive. Otherwise, the taking of any land in excess condemnation, although in reality wholly unrelated to the immediate improvement, would be sustained on a bare recital. This would be to treat the provision as giving such a sweeping authority to municipalities as to make nugatory the express condition upon which the authority is granted."

Since the taking, as proposed in the instant case, be not for a public use, then it is arbitrary and not reasonably related to the lawful purpose of the statute and would thus deprive petitioners of equal protection of the law as provided in the Fourteenth Amendment. *Colgate v. Harvey,* 296 U.S. 404, 424.

For the reasons above stated, petitioners respectfully submit that the statute, if constitutional, is being applied in a manner inconsistent with the protection of the Fourteenth Amendment.

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5. ARE PETITIONERS DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW WHEN THEIR PROPERTY IS TAKEN BY THE POWER OF EMINENT DOMAIN UNDER A STATUTE WHICH VESTS IN AN AGENCY AND BOARD OF SUPERVISORS THE RIGHT TO DETERMINE UNDER WHAT CONDITIONS THE POWER MAY BE EXERCISED WITHOUT PROVIDING STANDARDS BY WHICH SUCH DETERMINATION SHALL BE MADE?

Article III, Section 1 of the Constitution of the State of California prohibits the delegation of legislative power. It is respectfully submitted that the statute transfers legislative power to the agency in direct violation of that constitutional inhibition, hence, under the proposed plan, petitioners are deprived of property without due process of law.

Sections 33040 to 33045, inclusive, of the statute contain the definitions of "Blighted Areas". It is stated in Section 33040 that "These blighted areas are characterized by *one or more* of the conditions set forth in these sections."

It is a familiar proposition that the legality of delegation of power by the legislature depends upon the standards and guides set forth by the legislature within which an administrative body is allowed to function. If the guides and standards are sufficiently and definitely defined, the objection that there is an

unlawful delegation of power will fail; if not, the delegation violates the constitutional prohibition.

The Court below, in its decision in the instant proceeding, held that there was no unlawful delegation, stating that "the act contains as definite a description of what constitutes a blighted area as is reasonably possible to express;". With this conclusion we respectfully disagree and point to the decision itself for our support, keeping in mind that Section 33040 of the Act defines a "blighted area" as one characterized by ONE or more of the conditions set forth in subsequent sections. At page 27 of the decision, the Court below stated:

> "We do not deem it necessary to determine whether if only one of the designated conditions characterizing a blighted area under the statute exists, the statute could be enforced, as that question is not before us * * *"

At page 30, the Court below stated:

> "While probably no one element of the blight is sufficient to justify the taking by eminent domain, * * *"

At pages 52 and 53, the Court below sets up additional findings necessary before agencies proceed under the Act:

> "Public agencies and courts both should be chary of the use of the act unless, as here, there is a situation where the blight is such that it constitutes a real hindrance to the development of the city and cannot be eliminated or improved without public assistance."

From these three statements it is evident that the agency has not been supplied with a definite guide in the exercise of the power which the Statute purports to confer. Instead, the Statute empowers the agency to determine, not when and where certain specified conditions exist, but to determine what conditions not included in the Statute constitute an area "blighted", hence the delegation is unlawful.

In *Schneider v. District of Columbia,* supra, the Court stated, on the question of legislative delegation of power:

> "* * * the act of delegation must be sufficiently explicit to enable the administrators to act with administrative power and not impinge upon legislative power, and also to enable a court to determine whether administrators are within the constitutional grant."

Later, the same Court stated, in the same case:

> "We are not told where we may ascertain what a proper land coverage would be, or a building arrangement without defect, or a street layout without fault, or what is desirable economic use or even socially desirable use of land, or what is 'backward' or 'stagnant', or what is 'sound development'. These criteria for seizure would be formulated on a case-by-case basis."

This criticism is equally applicable in the instant case.

> "Delegation to a fact-finding body of the power to do something that is in itself circumscribed, after facts are found, is not the delegation of a

legislative function. But where the delegation to a fact-finding body empowers it to create the conditions which constitute the facts, that is legislative."

Wilson v. Philadelphia School Dist., 328 Pa. 225, 237, 195 A. 90.

For the reasons above stated, it is respectfully submitted that the Statute violates Article III, Section 1 of the California Constitution, in that it unlawfully delegates legislative power, hence the exercise of the power of eminent domain under that statute is invalid in the instant case and would deprive petitioners of property without due process of law.

CONCLUSION.

For the foregoing reasons, petitioners pray that this petition for Writ of Certiorari be granted.

Dated, San Francisco, California,
May 12, 1954.

Respectfully submitted,
MARTIN J. JARVIS,
Attorney for Petitioners.

JACK H. WERCHICK,
Of Counsel.

(Appendices A and B Follow.)

Appendix A

"Community Redevelopment Law"

(Part I, Division 24, Sections 33000-33954 of the Health and Safety Code of the State of California.)

Section 33040. "It is found and declared that there exists in many communities blighted areas which constitute either social or economic liabilities, or both, requiring redevelopment in the interest of the health, safety, and general welfare of the people of such communities and of the State. These blighted areas are characterized by one or more of the conditions set forth in Sections 33041 to 33044, inclusive."

Section 33041. "A blighted area is characterized by the existence of buildings and structures, used or intended to be used for living, commercial, industrial, or other purposes, or any combination of such uses, which are unfit or unsafe to occupy for such purposes and are conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime because of any one or a combination of the following factors:

(a) Defective design and character of physical construction.

(b) Faulty interior arrangement and exterior spacing.

(c) High density of population and overcrowding.

(d) Inadequate provision for ventilation, light, sanitation, open spaces, and recreation facilities.

(e) Age, obsolescence, deterioration, dilapidation, mixed character, or shifting of uses."

Section 33042. "A blighted area is characterized by:

(a) An economic dislocation, deterioration, or disuse, resulting from faulty planning.

(b) The subdividing and sale of lots of irregular form and shape and inadequate size for proper usefulness and development.

(c) The laying out of lots in disregard of the contours and other physical characteristics of the ground and surrounding conditions.

(d) The existence of inadequate streets, open spaces, and utilities.

(e) The existence of lots or other areas which are subject to being submerged by water."

Section 33043. "A blighted area is characterized by a prevalence of depreciated values, impaired investments, and social and economic maladjustment to such an extent that the capacity to pay taxes is reduced and tax receipts are inadequate for the cost of public services rendered."

Section 33044. A blighted area is characterized by:

(a) In some parts of the blighted area, a growing or total lack of proper utilization of areas, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to the public health, safety, and welfare.

(b) In other parts of the blighted area, a loss of population and reduction of proper utilization of the area, resulting in its further deterioration and added costs to the taxpayer for the creation of new public facilities and services elsewhere.

Section 33045. It is further found and declared that:

(a) The existence of blighted areas characterized by any or all of such conditions constitutes a serious and growing menace which is condemned as injurious and inimical to the public health, safety, and welfare of the people of the communities in which they exist and of the people of the State.

(b) Such blighted areas present difficulties and handicaps which are beyond remedy and control solely by regulatory processes in the exercise of the police power.

(c) They contribute substantially and increasingly to the problems of, and necessitate excessive and disproportionate expenditures for, crime prevention, correction, prosecution, and punishment, the treatment of juvenile delinquency, the preservation of the public health and safety, and the maintaining of adequate police, fire and accident protection and other public services and facilities.

(d) This menace is becoming increasingly direct and substantial in its significance and effect.

(e) The benefits which will result from the remedying of such conditions and the redevelopment of blighted areas will accrue to all the inhabitants and property owners of the communities in which they exist.

Section 33046. It is further found and declared that:

(a) Such conditions of blight tend to further obsolescence, deterioration, and disuse because of the lack

of incentive to the individual landowner and his inability to improve, modernize, or rehabilitate his property while the condition of the neighboring properties remains unchanged.

(b) As a consequence the process of deterioration of a blighted area frequently cannot be halted or corrected except by redeveloping the entire area, or substantial portions of it.

(c) Such conditions of blight are chiefly found in areas subdivided into small parcels, held in divided and widely scattered ownerships, frequently under defective titles, and in many such instances the private assembly of the land in blighted areas for redevelopment is so difficult and costly that it is uneconomic and as a practical matter impossible for owners to undertake because of lack of the legal power and excessive costs.

(d) The remedying of such conditions may require the public acquisition at fair prices of adequate areas, the clearance of the areas through demolition of existing obsolete, inadequate, unsafe, and insanitary buildings, and the redevelopment of the areas suffering from such conditions under proper supervision, with appropriate planning and continuing land use and construction policies.

Section 33047. For these reasons it is declared to be the policy of the State:

(a) To protect and promote the sound development and redevelopment of blighted areas and the general welfare of the inhabitants of the communities in which they exist by remedying such injurious con-

ditions through the employment of all appropriate means.

(b) That whenever the redevelopment of blighted areas cannot be accomplished by private enterprise alone, without public participation and assistance in the acquisition of land, in planning and in the financing of land assembly, in the work of clearance, and in the making of improvements necessary therefor, it is in the public interest to employ the power of eminent domain, to advance or expend public funds for these purposes, and to provide a means by which blighted areas may be redeveloped or rehabilitated.

(c) That the redevelopment of blighted areas and the provision for appropriate continuing land use and construction policies in them constitute public uses and purposes for which public money may be advanced or expended and private property acquired, and are governmental functions of state concern in the interests of health, safety, and welfare of the people of the State and of the communities in which the areas exist.

(d) That the necessity in the public interest for the provisions of this part is declared to be a matter of legislative determination.

Section 33574. After the adoption of a tentative plan for a project area, all applicants for building permits in the area shall be advised by the building department of the community that the site for which a building permit is sought for the construction of buildings or for other improvements is within a proposed redevelopment project area.

Appendix B

(Vol. 122 A.C.A. 836.)

In the District Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Civil No. 15,893

Redevelopment Agency of the City and County of San Francisco, a public body, corporate and politic, and The City and County of San Francisco, a municipal corporation,
Petitioners,

vs.

J. Joseph Hayes, Chairman of the Redevelopment Agency of the City and County of San Francisco,
Respondent,

Florence Van Hoff and Victor Berg, on behalf of themselves individually and all others similarly situated,
Interveners.

OPINION

Petition for writ of mandate to compel respondent chairman of petitioner Redevelopment Agency of

the City and County of San Francisco* to execute certain loan and grant contracts with the United States of America.

Questions Presented

1. Have interveners the right to intervene?

2. Constitutionality of the Community Redevelopment Law (Health & Saf. Code, pt. I, div. 24, §§ 33000-33954)† as applied to (1) slum clearance, (2) blighted area.

Record

Respondent demurred and in answer to the petition denied none of the facts set forth in the petition, but based his refusal to execute the contracts on the alleged grounds of the unconstitutionality of the act. Two taxpayers in the Diamond Heights Area, Florence Van Hoff and Victor Berg, on behalf of themselves and all others similarly situated, filed a complaint in intervention in which they demurred to the sufficiency of the petition on the ground that the proposed proceedings of the Agency are prohibited by the Fourteenth Amendment to the United States Constitution, and article I, sections 1, 11, 13, 14, 14½, 21; article III, section 1, and article IV, sections 24, 31, of the California Constitution. They also answered, denying certain allegations of the petition. Thereupon petitioners demurred to the complaint in intervention both generally and specially and on the ground that interveners have no right to inter-

*Hereafter referred to as "the Agency."
†Hereafter referred to as "the act."

vene. Petitioners also moved to strike the whole and all parts of the complaint in intervention on the grounds of interveners' lack of right and that the complaint is sham, irrelevant and argumentative. At the hearing, interveners' demurrer to the petition and petitioners' demurrer to, and motion to strike, the complaint were submitted.

PETITION

The petition sets forth that the Agency is a public body corporate and politic created under the act, after a declaration of the board of supervisors of the need for such agency, and the fact that the city had satisfied the "Community Prerequisites" of the act in that the city's Planning Commission has a master plan which includes all the matters required by the act to be in such plan. The Agency has undertaken a program for the elimination and redevelopment of blighted areas, of which the first two are the ones to be considered here, one being known as Western Addition Project and the other as Diamond Heights Project. The petition then gives the steps taken antecedent to the formulation of the redevelopment plans for both projects. As no attack is made on the regularity of those proceedings, they need not be detailed.

Certain facts are then alleged as to each area. Western Addition is a blighted area which constitutes both a social and economic liability requiring redevelopment in the interest of the health, safety and general welfare of the people of the city and state. It includes approximately 28 blocks and is characterized by

buildings used wholly or in part for residential purposes, which because of age, obsolescence, deterioration, dilapidation, mixed character and shifting uses, are unfit and unsafe for occupancy, and conducive to ill health, infant mortality, juvenile delinquency and crime. There are more than 2,000 substandard dwellings and hundreds of rooms in dilapidated rooming houses and row dwellings. More than 60 per cent of the dwelling units are dilapidated or lack private baths; more than 40 per cent have more than twice as many families than originally planned for; more than 50 per cent have inadequate toilet facilities; many lack installed heating; general use of portable coal oil heaters and storage of inflammable material constitute fire hazard; inadequate fire escape and exits add to the hazard of the inhabitants; extreme overcrowding is three and one-half times more prevalent in the area than in the city as a whole. The correction of these blighted conditions cannot be accomplished without redevelopment of the area as a whole, nor by private enterprise alone and without public participation. All of these conditions and this fact have been found by resolution and ordinance of the board of supervisors.

Diamond Heights is a blighted area constituting a social and economic liability requiring redevelopment in the interest of health, safety and general welfare. It includes approximately 325 acres. Much of the area was subdivided in 1863 and 1864; only 15 per cent of the area is occupied or used; 4 per cent is in improved boundary streets; 5 per cent playgrounds;

less than 6 per cent interior streets and dwellings. Such unuse and lack of development is due to lots of irregular form and shape having been laid out without regard to the contours and other physical characteristics of the ground such as cliffs, steep gradings and outcroppings of rock; more than 500 parcels are in separate ownership which makes it impossible to effectively assemble the land by private means without public assistance and exercise of the power of eminent domain; there is wasteful street design, unsuited and unadapted to the topography of the area; mapped streets of usable grade are connected with mapped streets of unusable grade, so steep as to render impossible the construction of usable streets; one-third of said streets are too steep to be usable; 66 acres of such mapped streets remain unpaved and undeveloped, there being only 1.4 acres of paved streets. The major portion of the area is unserved by utilities of any kind; existing public open spaces would be inadequate to serve the area if built up. Approximately 85 per cent of the area is vacant and undeveloped; 115 acres are in private ownership, of which only 17.8 acres are improved with houses, the remainder of the private ownership improvements consisting of truck yards, deteriorating sheds and two quarries. As a result of said faulty planning there is an economic dislocation and disuse of the area; a subdivision of lots into irregular form and shape and inadequate size for proper use and development; a layout of lots in disregard of the contours and other physical characteristics of the ground and surround-

ing conditions; nonexistence of adequate streets and utilities in the area. The area is characterized by the growing or total lack of proper utilization resulting in stagnant and unproductive condition of land potentially useful and available for contributing to the public health, safety and general welfare. The blighted condition is aggravated by the shortage of useful land in the city for residential development to alleviate the acute housing shortage and tends to render the lands unmarketable and thereby to force an abnormal pattern of residential growth.

Redevelopment is necessary to facilitate the redevelopment of congested, deteriorated areas in other sections of the city, particularly in Western Addition. Correction cannot be accomplished without redevelopment of the areas as a whole. This cannot be done by private enterprise alone without public participation and assistance. All of the above has been found by the board of supervisors by resolution and ordinance. Interveners admit the factual characteristics of the area but deny the conclusions and point out that for a long time past 210 acres have been and still are in public ownership.

The redevelopment of both projects requires (1) acquisition of lands by purchase or eminent domain, (2) demolition and clearance, (3) vacation and abandonment of certain street areas and dedication of other areas for street widening and other improvements and the consolidation of certain blocks into continuous land areas, (4) rough grading and in-

stallation of necessary site improvements and utilities, (5) replatting and zoning in conformity with the city's master plan, (6) disposition of said lands as improved by sale under suitable safeguards, restrictions, covenants and conditions as set forth in certain ordinances. Such redevelopment will eliminate the blight conditions alleged by providing: clearance, elimination and prevention of slum and blighted areas; a proper, well-planned, economic utilization of said areas; adequate open spaces; utilities; streets designed to carry fast through traffic while closing off traffic on other streets, thereby contributing to the safety of the inhabitants of the areas; school, shopping and other community facilities; improved lands near the center of the city for the construction of needed dwelling units; a substantial increase in the number of safe and sanitary dwelling units to ease the acute housing shortage.

Title I of the Housing Act of 1949 (P. L. 171, 81st Congress, 42 U.S.C. § 1451 et seq.) authorizes certain financial assistance to petitioners to aid in this redevelopment. Pursuant to applications filed by the Agency with the Housing and Home Finance Administrator, the administrator has advanced to the Agency $517,160.82, in addition to which the city has provided $78,962 to the Agency. On June 4, 1953, the Agency adopted a resolution directing respondent, as its chairman, to execute on behalf of the Agency a contract with the United States of America for a loan of $16,022,000 and a capital grant of $6,012,000

to aid in financing Western Addition Project and a contract for the loan of $5,049,000 and a capital grant of $334,000 to aid in financing Diamond Heights Project, both of which contracts have been approved by the board of supervisors. To satisfy the requirements of said contracts the city has undertaken to provide local grants-in-aid of $3,279,600 for Western Addition and $2,711,000 for Diamond Heights. The contracts have been executed by the administrator but respondent refuses to execute them.

Accompanying the petition are exhibits containing the various resolutions and ordinances of the board of supervisors, the tentative plans of the projects, reports on and photographs of the areas and other data.

1. Right to Intervene

Interveners are taxpayers of the city and county of San Francisco and residents and property owners in the Diamond Heights area. Obviously they have "an interest in the matter in litigation" (Code Civ. Proc. § 387) and therefore may be permitted to intervene. In *People ex rel. Fogg v. Perris Irr. Dist.*, 132 Cal. 289 [64 P. 399, 773], it is held that an intervener is entitled to all the procedure and remedies to which the respondent would be entitled to resist petioner's claims. In *Boskowitz v. Thompson*, 144 Cal. 724 [78 P. 290], it is held that the intervener is "limited to the same procedure and remedies as is such original party." In *Wright v. Jordan*, 192 Cal. 704, it is stated (p. 714 [221 P. 915]): "As to the

interveners herein it will suffice to say that while they were permitted to intervene to the extent and for the purpose of sustaining or opposing the respective contentions of the petitioners and respondent herein, their rights as interveners herein go no further, since they cannot be heard to broaden the scope or function of this special proceeding by urging claims or contentions which have their proper forum elsewhere, and in which forum they are already embattled."

In our case respondent expressly raises no issue on the facts set forth in the petition. Interveners in their complaint admit most of these facts although they strenuously deny the conclusions drawn by petitioners therefrom. Under the situation in this case and because of the limited facilities of this court to conduct a trial on factual issues, we deem it unnecessary to determine whether we have the power to permit interveners to raise issues of fact, but deem it better to confine the issues to those of law, leaving the factual issues, if any, to be determined in a tribunal better adapted to trying them. Therefore we will grant petitioners' motion to strike all of the complaint in intervention except those portions constituting a demurrer.

2. CONSTITUTIONALITY.

(a) *Slum Clearance.*

Although the two projects are a part of one program (undoubtedly other similar projects are to fol-

low) the character of the two areas proposed to be redeveloped are radically different. While the attack on the constitutionality of the act is basically on the fact that after the taking of private property by the power of eminent domain, if necessary, and after its redevelopment, it is to be sold to private persons, the difference in character of the areas presents different legal problems. Therefore we will consider the projects separately.

Clearly, Western Addition is a blighted area of the type usually referred to as a "slum." "'It is generally accepted that a slum area is one, which because of lack of adequate open spaces and community facilities, and because of a preponderance of substandard buildings, does not provide an environment in accordance with the accepted standard of urban neighborhood life.'" (Dissenting opinion of Van Voorhis, J., in *Kaskel v. Impellitteri* (N.Y.), 115 N.E.2d 659, 670, quoting from report of William G. Vladeck, Chief of Planning of the New York City Housing Authority.) Likewise, it comes within the definition of blighted area given in section 33041, Health and Safety Code: "A blighted area is characterized by the existence of buildings and structures, used or intended to be used for living, commercial, industrial, or other purposes, or any combination of such uses, which are unfit or unsafe to occupy for such purposes and are conducive to ill health, transmission of disease, infant mortality, juvenile delin-

quency, and crime because of any one or a combination of the following factors:

"(a) Defective design and character of physical construction.

"(b) Faulty interior arrangement and exterior spacing.

"(c) High density of population and overcrowding.

"(d) Inadequate provision for ventilation, light, sanitation, open spaces, and recreation facilities.

"(e) Age, obsolescence, deterioration, dilapidation, mixed character, or shifting of uses."

Statutory or constitutional provisions authorizing local public agencies to undertake urban development projects for slum clearance have been adopted in at least 37 states.* Their validity has been almost uniformly upheld.†

The precise question involved here has never been passed on in this state. The fact that the elimination of slums and the erection of safe and sanitary low-rent dwelling units for persons of the prescribed restricted income advances the public welfare and protects the public safety and morals and are in fact and law public purposes was determined in *Housing Authority v. Dockweiler*, 14 Cal.2d 437 [94 P.2d 794]. There the constitutionality of the Housing Cooperation Law (2 Deering's Gen. Laws Supp., Act 3484)

*See list in *Kaskel v. Impellitteri*, *supra*, 115 N.E.2d at p. 670.
†See list of authorities, *idem*, 115 N.E.2d at p. 670.

including the right of the public agency to use the power of eminent domain for slum clearance was upheld. That act, however, did not contemplate resale of the property condemned. Community Redevelopment Laws practically similar to our act in other states in their slum clearance aspects have been upheld with two exceptions. In the following cases the statute applied provided for the use, if necessary, of the power of eminent domain to obtain slum areas, their redevelopment and their sale and/or lease to private persons. In practically all of them the same federal constitutional questions were raised as in our case. In many of them the same questions were raised as to the particular state constitution as are raised as to the California Constitution in our case. In all of these cases the particular statute was upheld. These cases are: *Opinion of the Justices* (1950) 254 Ala. 343 [48 So.2d 757]; *Rowe v. Housing Authority* (1952), 220 Ark. 698 [249 S.W.2d 551]; *Zurn v. City of Chicago* (1945), 389 Ill. 18 [59 N.E.2d 18]; *People ex rel. Tuohy v. City of Chicago* (1946), 394 Ill. 477 [68 N.E.2d 761]; *People ex rel. Tuohy v. City of Chicago* (1948), 399 Ill. 551 [78 NE.2d 285]; *Chicago Land Clearance Com. vs. White* (1952), 411 Ill. 310 [104 N.E.2d 236]; *In re Slum Clearance in City of Detroit* (1951), 331 Mich. 714 [50 N.W.2d 340]; *State ex rel. Bruestle v. Rich* (1953), 150 Ohio St. 13 [110 N.E.2d 778]; *Belovsky v. Redevelopment Authority* (1947) 357 Pa. 329 [54 A.2d 277, 172 A.L.R. 953]; *Opinion to the Governor* (1949), 76 R.I. 249 [69 A.2d

531]; *Ajootian v. Providence Redevelopment Agency* (1952), —— R.I. —— [91 A.2d 21]; *Nashville Housing Authority v. City of Nashville* (1951), —— Tenn. —— [237 S.W.2d 946); *Foeller v. Housing Authority of Portland* (1952), —— Ore. —— [256 P2d 752]; *Hunter v. Norfolk Redevelopment & Housing Authority* (1953), —— Va. —— [78 S.E.2d 893].

The only cases which have failed to uphold statutes similar to ours are *Adams v. Housing Authority of City of Daytona Beach* (1952), —— Fla. —— [60 So.2d 663], and *Housing Authority of City of Atlanta v. Johnson* (1953), 209 Ga. 560 [74 S.E.2d 891]. The majority opinion in the Florida case determined that the Florida Housing Authority Act which authorized slum clearance followed by the construction of housing for people of small income was not to provide housing but to authorize the acquisition of property in slum areas so that it could be sold to private investors for industrial uses. It acknowledged that redevelopment acts "have been upheld by some of the courts of last resort of other states" (p. 665) without citing any decisions or discussing them. It then stated: "We have our own Constitution and adjudicated cases by this Court which are controlling * * * " In the Georgia case the public authority was to acquire slum property, remove the buildings from it and then sell the unimproved property to industrial enterprises. The court after referring to the fact that it had previously sustained as valid the Georgia Housing Authorities Law "not without some misgivings on the

part of some members of the court" stated: "We know that some courts of other jurisdictions have held that this can be done, and others have held that it cannot be done. What constitutes a 'public use' under the Constitution and laws of Georgia is a question that must be decided by the courts of this State, and what some other jurisdiction may have decided is in no way binding." (P. 893.) The decision neither cited nor discussed the decisions which it mentioned. The court apparently was influenced in its decision by the fact that the act did not require new housing to be erected on the slum area before turning it over to private interests. That the court is not in step with modern judicial thought is indicated by its rejection of the argument that removal of slums might decrease juvenile delinquency by saying, "We think juvenile delinquency exists on both sides of the railroad tracks * * * " The two cases last mentioned are not even persuasive authority in the face of the above-mentioned weight of authority.

The latest cases on the subject are *Kaskel v. Impellitteri, supra,* 115 N.E.2d 659, and *Schneider v. District of Columbia,* 116 F. Supp. ——.* In the Kaskel case the validity of proceedings for redevelopment of the "substandard and insanitary" Columbus Circle area in New York City was upheld. The Schneider case, decided November 5, 1953, contains a well-reasoned discussion of the questions arising from the

*Before Prettyman, Circuit Judge, and Curran and Keech, District Judges, sitting as a statutory three-judge court.

application of the District of Columbia Redevelopment Act, an act quite similar to our act. The Schneider case was actually two cases consolidated for trial, each dealing with a different type of area, one a slum area, and the other an area somewhat comparable to our Diamond Heights area. As applied to the slum area the court held the District of Columbia Redevelopment Act valid. We will discuss its application to the other area when we discuss the Diamond Heights problem. The main attack made on the District of Columbia act, as is the attack here, was that it authorized the taking by eminent domain of the fee title to private property and the sale or lease of that title to other private persons for private use. The court first pointed out that there is no doubt of the power of Congress to delegate to the district government the power to clear slums, such power lying within the well-established concepts of police power, namely, the protection of the public health, safety, morals and welfare, and that the clearance of slums is a public purpose to which the power of eminent domain applies. Moreover, it may be exercised not only to eliminate present slums but to prevent future slums. It should be pointed out here that the power of eminent domain applies only to the taking of property for a "public use." Originally the definition of "public use" was very narrowly restricted. Even low cost public housing which is now universally accepted as a public use, originally would have not been included in the definition. As pointed

out in the Schneider case, the more modern courts have enlarged the traditional definition of public use to include "public purpose." The idea now is that the taking of the property itself, as distinguished from the subsequent use of that property, may be required in the public interest. The case then holds that the taking of real property for the public purpose of eliminating or of preventing slums is within the power of eminent domain, even though the use to which the property is put after seizure is not a public use, provided (1) that the seizure of the title is necessary to the elimination of the slum, or (2) that the proposed disposition of the title may reasonably be expected to prevent the otherwise probable development of a slum. Ordinarily, title to real estate cannot be seized by the public body "merely because a slum presently exists upon the land. Some further necessitous circumstance must exist to validate such a seizure. It must be either that the clearance of the slum is impracticable without taking the title to the land or that proposed restrictions which can be imposed only through the medium of a resale are fairly calculated to prevent recurrence of slum conditions." (Schneider case, p. ——.) The Western Addition Project meets this test.

The Legislature has declared that slum conditions are injurious to the public health, safety, morals and welfare, and that to eliminate substandard housing and other slum conditions acquisition of property by eminent domain is necessary. Here the city and the agency officials to whom the Legislature has delegat-

ed the authority to determine whether such conditions exist and what property is necessary to be taken for the public purpose of eliminating those conditions have acted. We find nothing in the record to indicate that their determination is unreasonable or beyond their powers.

(b) *Diamond Heights.*

It is not contended that Diamond Heights constitutes a slum area. Its claimed necessity for redevelopment is its economic dislocation and disuse. It comes within the terms of section 33042 of the Health and Safety Code: "A blighted area is characterized by:

"(a) An economic dislocation, deterioration, or disuse, resulting from faulty planning.

"(b) The subdividing and sale of lots of irregular form and shape and inadequate size for proper usefulness and development.

"(c) The laying out of lots in disregard of the contours and other physical characteristics of the ground and surrounding conditions.

"(d) The existence of inadequate streets, open spaces, and utilities * * * "*

We have not included subdivision (e) dealing with submerged lots as there are none in the Diamond Heights area.

*The statute includes both this type of area and slum areas under the term "blighted area." For brevity and in order to distinguish slum areas factually from areas of the type of Diamond Heights we will refer to the latter as "deteriorated" areas, not as a word of description but merely as a word of reference.

There are not as many cases dealing with redevelopment statutes concerning deteriorated areas, nor are they as uniform in their decisions as are those concerning slum areas. We have been cited to and found only five cases discussing the subject. The latest is *Schneider v. District of Columbia, supra,* 116 F.Supp. ——, which, as we have shown, upheld the validity of the District of Columbia Redevelopment Act as related to slum clearance. However, it held the act invalid as related to deteriorated areas, stating that Congress in legislating, for the district has no power to authorize the seizure by eminent domain of property for the sole purpose of redeveloping the area according to its, or its agent's, judgment of what a well-developed, well-balanced neighborhood would be.

The case then considers one further situation, i. e., where a part of the deteriorated area contains slums. It holds that only that portion of the area geographically necessary to the elimination of slums may be taken.

The court distinguishes *Foeller v. Housing Authority of Portland, supra,* 256 P.2d 752, and *Schenck v. City of Pittsburgh, infra,* 364 Pa. 31 [70 A.2d 612], in both of which cases the properties seized were developed for nonresidential purposes, by pointing out that in each case the seizure and resale of the properties was a clear method of serving two purposes, (1) to prevent the recreation of slums, and (2) to enlarge the potential activity upon which the city

lived. The court seemed to consider that the first purpose could exist alone but that the second purpose must be concomitant with the first. It referred to *Fallbrook Irr. Dist. v. Bradley* (1896), 164 U. S. 112 [17 S.Ct. 56, 41 L.Ed. 369], which involved an irrigation act of the State of California and the question was whether the construction of irrigation works is a public purpose, and also to *Clark v. Nash* (1906), 198 U.S. 361 [25 S.Ct. 676, 49 L.Ed. 1085], where the doctrine of the Fallbrook case was applied to an irrigation project in the state of Utah, although the project, authorized by a state statute, was the condemnation of land by an individual for the purpose of irrigating his own land, and other cases. Concerning these and the Foeller and Schenck cases, *supra*, the court said that the basis of the decisions was "meeting a compelling community economic need is a public purpose." It then referred to *People of Puerto Rico v. Eastern Sugar Associates* (1946), 156 F.2d 316, certiorari denied 329 U.S. 772 [67 S.Ct. 190, 91 L.Ed. 664], which considered a statute of the insular Legislature embodying a far-reaching program of agrarian reform designed to remedy desperate economic conditions existing in the islands. The act authorized the seizure of large holdings of land used for the raising of sugar, especially that owned by corporations, and the redistribution of the land to individuals in small parcels. The statute was upheld upon the public necessity for solution of the general and acute conditions and upon the conclusion that the statute was reasonably calculated to deal with these problems.

Thus, the Schneider decision recognizes that property may be taken for redevelopment for other than purely slum clearance purposes, namely, to meet a compelling community economic need. The case then considers whether as to the nonslum area in the District of Columbia the proposed taking was to meet such need. It states that the redevelopment plan is based on the opinion of its proponents that residential neighborhoods should be "well-balanced" and that the area should contain housing for all income groups. It points out that "No acute housing shortage is to be met"; in fact, the plan contemplates no more residents after redevelopment than now. "No pressing economic condition" is shown. No purpose of housing for the needy is shown. "No rearrangement of streets is contemplated," the streets in the project area being continuous lines of the streets in other parts of the District of Columbia. "In sum the purpose of the plan, in addition to the elimination of slum conditions, is to create a pleasant neighborhood, in which people in well-balanced proportions as to income may live." The court then states: "But as yet the courts have not come to call such pleasant accomplishments a public purpose which validates Government seizure of private property. The claim of Government power for such purposes runs squarely into the right of the individual to own property and to use it as he pleases. Absent impingement upon rights of others, and absent public use or compelling public necessity for the property, the individual's

right is superior to all rights of the Government and is impregnable to the efforts of government to seize it. That the individual is in a low-income group or in a high-income group or falls in the middle of the groups is wholly immaterial. One man's land cannot be seized by the Government and sold to another man merely in order that the purchaser may build upon it a better house or a house which better meets the Government's idea of what is appropriate or well designed." It should be noted that the act involved in the Schneider case (60 Stats. 790) refers only to "substandard housing and blighted areas." It contains no definition of "blighted area" similar to that contained in section 33042, Health and Safety Code.

We are in accord with the Schneider decision that where no compelling community economic need is shown, the power of eminent domain may not be used. As hereafter shown, there appears to be such need in Diamond Heights.

The next most recent case is *Kaskel v. Impellitteri, supra,* 115 N.E.2d 659. There the appropriate New York municipal body proceeded under section 72-k of the General Municipal Law to find that a Columbus Circle area was "substandard and insanitary" and to plan a project for the removal of all buildings in it, redevelop it and then sell or lease portions of the area to private concerns. A taxpayer brought suit contesting the finding that the area was substandard and insanitary and asked that a court trial be had to determine that question. The majority opinion which held that as there was ample evidence to justify the

City Planning Commission's findings and there was no charge that it acted corruptly or arbitrarily, the courts could go no further into this subject, adopts the minority opinion on all other questions in the case. It is held that the statute providing for slum clearance (§ 72-k of the General Municipal Law) is constitutional but can only be applied if the project is primarily for slum clearance. The minority opinion was to the effect that there was evidence supporting the plaintiff's claim that the area was not a slum area and slum clearance was not the primary object of the project but was secondary to turning the property over to private enterprise for the construction and operation of a sports coliseum; therefore, the case should be tried to determine the true factual situation.

People v. City of Chicago, supra, 111 N.E.2d 626 (March, 1953), involved the validity of the 1949 amendments to the Illinois Blighted Areas Redevelopment Act of 1947. As originally enacted that act was limited to "slum and blighted" areas—in substance, what we have considered here "slum areas" only—provided for their elimination and the construction of redevelopment projects financed by private capital. The amendment broadened the definition of "blighted areas" to include practically the same conditions set forth in section 33042 of the Health and Safety Code. Following the procedure provided in the act the Chicago Land Clearance Commission determined a certain 40-acre area to be blighted. Thereupon a private corporation submitted to the commis-

sion a redevelopment plan whereby it was to acquire the property, construct dwelling units thereon and sell them to private buyers. This plan required the use of public funds and the power of eminent domain. A quo warranto proceeding was brought to determine the validity of the amendment and the proposed procedure. No attack was made on the act as originally enacted as its validity had been sustained in *People ex rel. Tuohy v. City of Chicago, supra,* 78 N.E.2d 285, and *Chicago Land Clearance Com. v. White, supra,* 104 N.E.2d 236. While there is mention of slum eradication in the case, a study of it indicates that the question presented was clearly whether the acquisition of vacant land areas by a public agency for subsequent sale to private interests for development for residential use was an acquisition for a public use or public purpose permitting eminent domain to be employed. There was no slum condition in the area to be taken. The tie-in with slum eradication is based upon the statement that the development of areas for providing additional housing is necessary as an adjunct of clearing slum areas. "So far as we are aware, this is the first case in which governmental efforts to deal with unmarketable areas of vacant land have received judicial consideration * * * What is involved here is, by the definition of the statute, an area which, because of characteristics of scattered ownership, undesirable platting, deteriorated site improvements, or excessive tax delinquencies, has in fact become unmarketable and because of its unmarket-

ability has distorted the normal development of the community.

"The deleterious effect of such areas has been recognized by the Congress which has provided for Federal assistance in eliminating 'land which is predominately open and which because of obsolete platting, diversity of ownership, deterioration of structures or of site improvements, or otherwise substantially impairs or arrests the sound growth of the community * * *' (42 U.S.C.A., par. 1460.) In the statute here involved, and in another statute known as the Blighted Vacant Areas Development Act of 1949 (Ill. Rev. Stat. 1949, chap. 67½, pars. 91.1-91.7), the General Assembly of Illinois has recognized that such vacant areas in their present condition are incapable of development for housing purposes by private enterprise. They are characterized as economic, social and physical waste lands, the elimination and development of which is declared to be a public use." (P. 634.)

The court then held that the amendment was valid and constitutional. "The purpose and use to which the vacant blighted property is to be taken is both a public purpose and a public use, since the taking tends to alleviate a housing shortage, is an essential aid and adjunct to slum clearance, removes hazards to health, safety, welfare and morals of the community by developing the area, and eliminates factors impairing and arresting sound community growth." (P. 635.)

The minority opinion points out that the majority opinion holds that the acquisition of vacant land and its development for residential uses even though unrestricted to low-rent accommodations is sufficiently related to the subject of slum clearance as to constitute the taking of land for a public use, a holding with which the minority opinion disagrees.

Foeller v. Housing Authority of Portland, supra, 256 P.2d 752 (1952), was brought to determine the validity of Oregon's Urban Redevelopment Law. While the project under consideration there was to take an area 53.8 per cent residential and redevelop it into an area completely commercial or industrial, the court held that the primary purpose was to prevent the development of slum conditions in that area. The case cannot be considered authority as to the situation where the area to be taken is a deteriorated one solely.

Thus we find that the only case which upheld the validity of a redevelopment statute as applied to a nonslum area is the City of Chicago case, and even in that case the court felt constrained to tie in the principle of the slum clearance cases by stating that providing housing was an adjunct of slum clearance. This constitutes a very elastic tie, for, based on that theory, any project of redevelopment could be supported as slum prevention if only it provided additional housing.

However, it appears from the cases on eminent domain dealing with a new subject to which the pow-

er is attempted to be applied that the right to its use depends upon what is referred to in the Schneider case as a "compelling community economic need." Our task, then, is to determine first whether the act is based on such a requirement, and secondly, whether in its application to the Diamond Heights Project such a need is shown. As to the basis of the act—in addition to sections 33041 and 33042, Health and Safety Code, heretofore quoted, there are a number of other significant sections. Section 33040 finds that in many communities there exist blighted areas which constitute social or economic liabilities, requiring redevelopment in the interest of the health, safety and general welfare of the people. These blighted areas are characterized by one or more of the conditions set forth in sections 33041-33044, inclusive. Section 33043 additionally characterizes a blighted area by a prevalence of depreciated values, impaired investments and social and economic maladjustments reducing the capacity to pay taxes so that tax receipts are inadequate for the cost of public services rendered. Section 33044 additionally characterizes a blighted area as one where in some parts a growing or total lack of proper utilization of areas results in a stagnant and unproductive condition of land potentially useful and valuable for contributing to the public health, safety and welfare. The section further refers to a loss of population and reduction of proper utilization of the area, resulting in its further deterioration and added costs to the taxpayer for the creation of new public facilities and services elsewhere. Section 33045 de-

clares the policy that the existence of blighted areas characterized by any or all of the conditions in the preceding sections constitutes a rising menace to public health, safety and welfare, cannot be remedied by use of the police power, necessitates excessive expenditures, and their removal is of benefit to the local population and property owners. Section 33046 continues the declaration of policy that such conditions cause continuing deterioration and disuse, that the blight cannot be corrected except by redeveloping the entire area, or substantial portions of it, that there is an impracticability of private assembly of small parcels in scattered ownership, and as a practical matter is so difficult and costly and lacking in legal power as to make it impossible to remedy by private owners. The only practical remedy is by public acquisition, clearance and planned redevelopment. Section 33047 declares that to protect and promote the sound development and redevelopment of blighted areas and the general welfare, these conditions should be remedied by all appropriate means including the expenditure of public funds and the use of eminent domain, and that the necessity of redevelopment in the interests of health, safety and welfare of the people is a matter of legislative determination.

We do not deem it necessary to determine whether if only one of the designated conditions characterizing a blighted area under the statute exists, the statute could be enforced, as that question is not before us. However, it is clear that a combination of many of them establishes a menace to the health, safety and

general welfare of the people of the community, and if such menace cannot be removed by private capital or police power, and requires redevelopment as outlined in the act, there would then exist a compelling community economic need.

Application to Diamond Heights Project

This brings us to the question as to whether the petition shows a compelling community economic need for the project. Accompanying the petition are a series of exhibits setting forth the proceedings taken by the various city and county authorities, plans of the project, reports considered, maps of the present areas, and maps showing the projected uses to be made of the area. From these, it appears that the board of supervisors found, based upon substantial evidence, that the Diamond Heights area is a blighted one characterized, at least, by the conditons set forth in sections 33042 (a) to (d), inclusive, 33044, 33045, 33046 and 33047.

The record shows that approximately 85 per cent of the area consists of vacant land which is in a state of economic disuse because private enterprise in the absence of governmental assistance cannot redevelop it in the community interest. This is due to the grid-iron pattern of streets of approximately 66 acres of unimproved streets not adapted to the contour of the land, unsuited to the topography and too steep to be usable; to the fact that lots of irregular form and shape, many of them excessively long and narrow, have been laid out in disregard of the contours and

other physical characteristics of the ground such as cliffs, outcroppings of rock, and steep grades. There are 500 lots owned by separate individuals whose holdings vary in size from lots of 25 feet width to parcels of half an acre. Only 15 per cent of the area is used. There is a shortage of land in San Francisco and the welfare of the people requires that this unproductive area be used for dwelling and public places. In many instances the blighted condition of the area has resulted in sale of property to the state for delinquent taxes. The tentative plan shows that other than the public places the redevelopment is to be predominantly residential, consisting of single-family houses and multifamily houses. Open space, commercial, public (firehouse, schools, park, playgrounds), institutional (churches, nursery schools, community buildings, and other uses are planned. It is not sufficient to say that the streets can be changed by ordinary eminent domain and street proceedings. Because of the peculiar layout of the streets as now shown on the map, the cost of abandonment proceedings and eminent domain proceedings would practically be prohibitive for, because of the many ownerships and the irregularity of the parcels, the cost of the taking and resultant damage to the parts not taken would nearly equal the entire value of the private areas. While a large part of the area is in public ownership and could be developed by the authorities, it is so broken and interspersed with private ownerships as to require a consideration of the whole area.

While probably no one element of the blight is sufficient to justify the taking by eminent domain, the combination of a great and pressing demand for more housing, the correlation of the area with other areas of the city, by streets and public places, the fact that without governmental help the area cannot be developed and will continue to deteriorate, together with all the circumstances shown by the record, demonstrate the compelling community economic need required to permit the application of the act.

Interveners contend that there is no necessity for the proposed Diamond Heights plan inasmuch as the private owners have had no opportunity to develop the area because 65 per cent of it has been held by public agencies, and the failure of the latter to act is a cause of the present condition. They claim that the area could have been developed many years ago when building costs were lower, the labor supply was more abundant, materials were available, and loans for construction were available at much lower rates. Regardless of the reason for the condition, and what might have been done, we are confronted with the present condition. Interveners contend that there is no demand for dwellings of the class contemplated by the plan. This question is one for the city and the agency to determine.

Title of the Act

All of the points raised against the validity of the act have already been determined in the cases herein

cited. However, we will discuss in more detail these points, without attempting to cite all the cases considering the particular point. Thus the claim that the act embraces more than one subject which are not expressed in the title—"An act to consolidate and revise the law relating to community redevelopment and housing for the preservation of the public health and safety, and the formation, regulation, and operation of corporations therefor, by adding Division 24 and Section 40021 to the Health and Safety Code, and repealing certain acts specified herein"—is similar to the claim made in *People v. City of Chicago, supra,* 111 N.E.2d 626, concerning the Illinois Blighted Area Development Act. The court said (p. 632): "An act may include all matters germane to its general subject, including the means reasonably necessary or appropriate to the accomplishment of the legislative purpose * * * To render a provision in the body of a statute void as not embraced in the title, the provision must be one which is incongruous, or which has no proper connection with the title." The court then pointed out that there was an interrelation between all the matters permitted by the act and found that they were germane to the single subject of redevelopment of blighted areas. That case holds that there is an interrelation between slum clearance and the elimination of stagnant vacant areas. Redevelopment, contrary to interveners' contention, is not necessarily confined to the one term "build up," in the sense that it can only be applied to changing a built-up area. All of the matters provided for in our

statute are germane to "community redevelopment and housing for the preservation of the public health and safety." "In our opinion, the interrelationships between slum clearance, the revitalization of 'dead' areas like that here involved, and the construction of additional housing which have thus been recognized by Congress, the General Assembly and this court, amply justify the legislature in regarding the matters involved in the present statute as germane to a single subject—the elimination of slums." (*People v. City of Chicago, supra,* 111 N.E.2d at p. 633.)

A somewhat similar contention was held unfounded in *Foeller v. Housing Authority of Portland, supra,* 256 P.2d 752, the court saying that the act "contains only one subject; that is, the revitalization of blighted areas. All else in the act is 'properly connected therewith.'" (P. 777.) See, also, *City of Whittier v. Dixon,* 24 Cal.2d 664 [151 P.2d 5, 153 A.L.R. 956], concerning the sufficiency of the Vehicle Parking District Act of 1943.

PUBLIC PURPOSE

The contention that the proposed Diamond Heights plan does not constitute a public use, is answered in *Oliver v. City of Clairton,* Supreme Court of Pennsylvania, March, 1953, 374 Pa. 333 [98 A.2d 47]. While in that case there was some slum clearance involved, it appears that the main attack on the redevelopment plan was that the area was not a blighted one because so much of it was vacant land. There the five acres which were to be redeveloped for heavy

industrial purposes, consisted of 58 residential lots which, however, were not actually laid out with open streets; there were seven small buildings in that area, and over 90 per cent of the land was vacant and unimproved. The assessed valuations over a decade had decreased, 15 of the lots were delinquent for many years in taxes, and the ownership of the lots was divided among approximately 22 individuals. Except for the fact that half of the few dwellings involved were substandard or slum grade, the situation was similar in many respects to that in Diamond Heights. Appellant there contended that as a large part of the area consisted of vacant land it could not be treated as blighted area. The court pointed out that, just as is the situation with regard to our act, there was nothing in the Pennsylvania act limiting the certification of blighted areas to improved property, but on the contrary, vacant areas were expressly included. It then stated: "It may be well to point out once more what was said in the Schenck case, 364 Pa. at page 37, 70 A.2d at page 615, that the Urban Redevelopment Law is to be sharply distinguished from the Housing Authorities Law of May 28, 1937, P. L. 955 * * * in that the latter aimed principally at the elimination of undesirable dwelling houses, whereas the Urban Redevelopment Law 'was obviously intended to give wide scope to municipalities in redesigning and rebuilding such areas within their limits as * * * no longer meet the economic and social needs of modern city life and progress.' Redevelopment authorities have the power, therefore, where the

conditions prescribed in the act are found to exist, to exercise the right of eminent domain pursuant to a redevelopment proposal even though the redevelopment area may be predominantly open, vacant or unimproved." (P. 52.)

The contention is further answered in *People v. City of Chicago, supra,* 111 N.E.2d 626, 633: "Next to be considered is plaintiff's contention that the acquisition of vacant land areas of the type here involved by a public agency, for subsequent sale to private interests for development for residential use, is not acquisition for a public use or a public purpose, and that therefore eminent domain may not be employed and public funds may not be expended. This court has recognized the existence of an acute housing shortage, *Cremer v. Peoria Housing Authority,* 399 Ill. 579, 78 N.E.2d 276, and the evidence in this case confirms the continued existence of that shortage. We have held that the expenditure of public funds for the acquisition of land by a public agency to be sold to a private developer for the construction of non-low-rent housing constitutes a public purpose. *Cremer v. Peoria Housing Authority,* 399 Ill. 579, 78 N.E.2d 276. In *Zurn v. City of Chicago,* 389 Ill. 114, 59 N.E. 2d 18, we held that the elimination and redevelopment of slum and blighted areas is a public purpose and a public use regardless of the subsequent sale or lease of the property to private interests after redevelopment had been accomplished. And even more recently, in *Chicago Land Clearance Commission v. White,* 411 Ill. 310, 104 N.E.2d 236, we held that a

condemnation proceeding under the Blighted Areas Redevelopment Act of 1947 was not a proceeding to acquire land for private purposes merely because a Land Clearance Commission had entered into a contract with a private corporation for the sale of the area after it was acquired. *Chicago Land Clearance Commission v. White,* 411 Ill. 310, 104 N.E.2d 236."

In *Foeller v. Housing Authority of Portland, supra,* 256 P.2d 752, it was pointed out that the transformation of an entire area which is struggling against obsolete planning and is otherwise blighted, into one from which all hazards to the city's health, morals and safety have been eradicated and the placing in deeds conveying such portion of the area as may go into private ownership, of conditions and covenants to prevent the recurrence of blight, constitutes a public use of such area. It must be pointed out that neither esthetic views nor considerations of economic advantage to the community or a combination of both are sufficient to justify the use of eminent domain for redevelopment purposes. The redevelopment program must be necessary to protect the public health, morals, safety or general welfare through the elimination of blighted areas. (*Opinion to the Governor,* 76 R.I. 249 [69 A.2d 531].)

In *Fallbrook Irr. Dist. v. Bradley, supra,* 164 U.S. 112, 163, a case arising in California, it was held that the state's power of eminent domain may be exercised if the taking "be essential or material for the prosperity of the community * * * "

The act is premised upon the expressly declared policy that elimination of blighted areas of the Diamond Heights type and the redevelopment of such areas along the lines contemplated here are public uses and purposes and are governmental functions of state concern. As said in *Housing Authority v. Dockweiler, supra,* 14 Cal.2d 437 (dealing with slum clearance for public housing projects), (p. 449): "While such a declaration of policy by the legislative branch of the government is not necessarily binding or conclusive upon the courts, it is entitled to great weight and it is not the duty or prerogative of the courts to interfere with such legislative finding unless it clearly appears to be erroneous and without reasonable foundation."

PUBLIC USE

While in *Gravelly Ford Canal Co. v. Pope & Talbot Co.,* 36 Cal.App. 556, 563 [178 P. 150], the court applied the strict definition of "public use," it is significant that in *University of Southern Calif. v. Robbins,* 1 Cal.App.2d 523 [37 P.2d 163], the court held that the taking of land by eminent domain by a private institution, the University of Southern California, to be used as a library for its own students, was for a public purpose. In *Tuolumne Water etc. Co. v. Frederick,* 13 Cal.App. 498, the court said (p. 503 [110 P. 134]): "The courts would not be aiding the great enterprises of the west by adopting a narrow and restricted view of the meaning of the words 'public use' as used by the legislature and in our

constitution." Both cases advocate an expanded concept of what is use by the public.

Housing Authority v. Dockweiler, supra, 14 Cal.2d 437, adopted the broader interpretation as the rule to be followed in this state. It might be pointed out that as our community life becomes more complex, our cities grow and become overcrowded, and the need to use for the benefit of the public areas which are not adapted to the pressing needs of the public becomes more imperative, a broader concept of what is a public use is necessitated. Fifty years ago no court would have interpreted under the eminent domain statutes, slum clearance even for public housing as a public use, and yet, it is now so recognized. In addition, slum clearance for redevelopment purposes is likewise so recognized. To hold that clearance of blighted areas as characterized by the act and as shown in this case and the redevelopment of such areas as contemplated here are not public uses, is to view present day conditions under the myopic eyes of years now gone. As said in *Miller v. Board of Public Works,* 195 Cal. 477, 488 [234 P. 381, 38 A.L.R. 1479]: "As the interest of society justifies restraints upon individual conduct, so, also, does it justify restraints upon the use to which property may be devoted. It was not intended by these constitutional provisions to so far protect the individual in the use of his property as to enable him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself or to promote its general

well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare."

Pennsylvania Mut. Life Ins. Co. v. City of Philadelphia (1913), 242 Pa. 47 [88 A. 904, 49 L.R.A.N.S. 1062], is not applicable. There the court held that taking private property adjoining a parkway merely to resell it to private persons subject to restrictions for " 'the preservation of the view, appearance, light, air, health or usefulness' " of the parkway, was not a taking for public use. It pointed out that there have been two different interpretations of "public use" in this country, one the broader meaning of "public utility or advantage," the other narrower one of "use, or right of use, by the public," and that it preferred the narrower meaning. However, it indicated that there could be a taking for the purpose indicated if the city were to keep ownership of the property taken rather than resell it. Apparently the question of public use under this decision depended upon whether the property taken is to be continued in public ownership rather than whether the use itself is a public one. In California our courts have followed the broader definition of "public use" and the cases hereinbefore cited have held that if property is taken for a public use, the fact that it is later to be returned to private ownership subject to restrictions protecting the public use, does not make it any the less a public use. The later Pennsylvania cases have refused to follow the narrow interpreta-

tion in the Pennsylvania Mutual case, and in addition, have supported the last mentioned statement. See *Belovsky v. Redevelopment Authority, supra,* 54 A.2d 277; *Schenck v. City of Pittsburgh, supra,* 70 A.2d 612. While it has been held that private property may not be taken for purely esthetic reasons (that rule is discussed in the Pennsylvania Mutual case, p. 906), it would seem proper in the light of the more modern cases, including the later Pennsylvania cases, to take private property if it were needed to protect a parkway and to provide light and air and usefulness for it. Section 14½, article I of the California Constitution (excess condemnation) provides this. Once it is determined that the taking is for a public purpose, the fact that private persons may receive benefit is not sufficient to take away from the enterprise the characteristics of a public purpose. (*Housing Authority v. Dockweiler, supra,* 14 Cal.2d 437; see, also, *Chicago Land Clearance Com. v. White, supra,* 104 N.E.2d 236; *Herzinger v. Mayor & City Council of Baltimore* (Md.), 98 A.2d 87, 92; *Zurn v. City of Chicago, supra,* 59 NE.2d 18; *Waddell v. Chicago Land Clearance Com.,* 206 F.2d 748.) "That purpose, as before pointed out, is not one requiring a continuing ownership of the property as it is in the case of the Housing Authorities Law in order to carry out the full purpose of that act, but is directed solely to the clearance, reconstruction and rehabilitation of the blighted area, and after that is accomplished the public purpose is completely realized. When, therefore,

the need for public ownership has terminated, it is proper that the land be re-transferred to private ownership, subject only to such restrictions and controls as are necessary to effectuate the purposes of the act. It is not the object of the statute to transfer property from one individual to another; such transfers, so far as they may actually occur, are purely incidental to the accomplishment of the real or fundamental purpose." (*Belovsky v. Redevelopment Authority, supra,* 54 A.2d 277.) (See, also, *Rowe v. Housing Authority, supra,* 249 S.W.2d 551.)

McCord v. Housing Authority of City of Dallas (Tex. Civ. App.) 234 S.W.2d 108, is not in point here. It decided that the Housing Authority Law under which the Housing Authority purported to act contained no provision for selling or leasing the redeveloped land after slum clearance to private persons. For that reason it confined the definition of "public purposes" as used in the law to the continued ownership of the property after development by the authority. It contrasted the law with a federal law which expressly provided for making slum cleared land available for development by private enterprise.

Equal Protection

The claim that the Redevelopment Acts because they provide for acquisition of property by eminent domain and its later resale, violate the Fourteenth Amendment to the Constitution in denying to the property owners the equal protection of the law, has

been denied in several cases, among others, *Ajootian v. Providence Redevelopment Agency, supra,* 91 A.2d 21; *Nashville Housing Authority v. City of Nashville, supra,* 237 S.W.2d 946; *Belovsky v. Redevelopment Authority, supra,* 54 A.2d 277; *Robinette v. Chicago Land Clearance Com.* (U.S. Dist. Ct., Ill., 1951); *State ex rel. Bruestle v. Rich, supra,* 110 N.E.2d 778. While the decision in the Robinette case is merely a "Memorandum and Order," the order dismissing the action for want of a substantial federal question, and is unpublished, it is of value for the reason that in *Robinette v. Campbell,* 342 U.S. 940 [72 S.Ct. 563, 96 L.Ed. 699], the Supreme Court denied motions for leave to file petitions for a writ of mandamus to compel the trial judge to expunge his order of dismissal. As said in *Waddell v. Chicago Land Clearance Com., supra,* 206 F.2d 748, where the same federal questions were raised (p. 750): "Thus it is seen that the Supreme Court has refused to entertain an application to review the questions which appellants have attempted to present by this action."

As pointed out in those cases, the acquiring of the property is for a public use, its sale and the transfer of the property from one individual to another, so far as they may occur, are merely incidental to that use, and not the main object of the statute. The taking from the owner is not arbitrary. It is for a public purpose. The owner is guaranteed and will receive full compensation. In *State ex rel. Bruestle v. Rich, supra,* 110 N.E.2d 778, in discussing the contention made concerning the proposed redevelopment proj-

ect, similar to the contention made here, that the plan contemplated taking the property of one person and reselling it to another and was therefore unconstitutional, the court stated that the primary purpose of the plan was to eliminate the blight conditions and provide against their recurrence. It then stated (p. 785): "The exercise of the right of eminent domain under such a project, carried out pursuant to state law, has likewise been held by the Supreme Court of the United States as not to be contrary to the Fourteenth Amendment to the federal Constitution. *Burt v. City of Pittsburgh,* 340 U.S. 802, 71 S.Ct. 53, 95 L.Ed 589." See, also, *Waddell v. Chicago Land Clearance Com., supra,* 206 F.2d 748.

DUE PROCESS

The act does not violate the due process clause of the Fourteenth Amendment to the federal Constitution. (See *Robinette v. Chicago Land Clearance Com., supra.* (U.S. Dist. Ct., Ill., 1951); *People v. City of Chicago, supra,* 111 N.E. 2d 626, 636.) To violate the due process clause a state statute permitting state action in economic affairs must be arbitrary and without reason. (*Olsen v. Nebraska,* 313 U.S. 236 [61 S.Ct. 862, 85 L.Ed. 1305, 133 A.L.R. 1500]; *United States v. Carolene Products Co.,* 304 U.S. 144 [58 S.Ct. 778, 82 L.Ed. 1234].) The courts are restricted to an inquiry as to whether any state of facts known or which reasonably could be assumed support the legislative judgment in enacting the statute. (*United States v. Carolene Products Co., supra,* 304 U.S. 144, 154.)

While the legislative findings are not binding on the court, they are entitled to great respect. (*Block v. Hirsh*, 256 U.S. 135 [41 S.Ct. 458, 65 L.Ed. 865]; *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 [46 S.Ct. 320, 70 L.Ed. 654].) Not only the California Legislature but the Congress of the United States and the legislatures of many states have made legislative findings of the necessity of redeveloping blighted areas by the use of private as well as public means. That modern conditions require such action is shown in the many books, articles and reports on community planning produced in the last few years. The courts, too, are entitled to take judicial notice of the need for, and the change in attitude towards, such planning. (See article by Hon. Emmet H. Wilson, *Consideration of Facts in Constitutional Cases*, vol. 17, So.Cal. L.Rev. 335.) As article I, section 13 of the California Constitution is identical in scope and purpose with the Fourteenth Amendment of the federal Constitution, what has been said here concerning due process under the latter applies to it under the California Constitution.

Does the Act Unlawfully Delegate Legislative Power to the Agency?

Interveners contend that as the agency is delegated the power to determine whether a given area is blighted, such delegation is contrary to article III, section 1 of the Constitution, which provides for the separation of powers into the three branches of government. It is contended that the characterization of